THE DIRECT TAX OF 1861.

THE direct tax laid by the act of Congress of August 5, 1861, was the fifth levy which has been made under the provisions of the Constitution, requiring that "representation and direct taxes shall be apportioned among the several States . . . according to their respective numbers." There would be little risk in predicting that this will also be the last resort to a method of taxation which the framers of the Constitution thought important enough to hold a place in one of the difficult compromises embodied in that instrument. The insufficiency of the method for revenue purposes, the confusion which has arisen as to the meaning and incidence of a direct tax under the Constitution, the extraordinary inequalities which grew out of the circumstances under which the last levy was made, and the really insoluble questions raised as to the effect which refunding the tax would have in mitigating or aggravating those inequalities, make it altogether probable that, in any future stress of fortune, relief for the Treasury will be sought anywhere else rather than in a resort to this discredited source.

The phrase "direct taxation" appears to have been introduced in the Convention of 1787 by Gouverneur Morris, on July 12,* when he made the motion, which was carried, "that direct taxation ought to be proportioned to representation." The Convention, perhaps, had no clear opinion as to the precise meaning of the words here used;† but it is plain that Morris had in mind some

* The use of the same expression in what purports to be the draft of a Constitution offered by Mr. Pinckney, May 29, need not be considered, in view of the plainly garbled text of that document. Elliot, *Debates*, v. 130, 578.

† Thus, on August 20, when the report of the Committee of Detail was under discussion, "Mr. King asked what was the precise meaning of direct taxation. No one answered." *Madison's Debates*, in Elliot, v. 451.

well-marked distinction between direct and indirect taxes. He had proposed at first simply that "taxation shall be in proportion to representation." To this it was objected that, although just, this plan might be embarrassing and "might drive the legislature to the plan of requisitions"; and Morris thereupon, admitting that objections were possible, "supposed they would be removed by restraining the rule to direct taxation. With regard to indirect taxes on exports and imports and on consumption, the rule would be inapplicable." Wilson also saw no way of carrying Morris's plan into execution, "unless restrained to direct taxation"; and Morris then modified his motion, with the result that the phrase "direct taxes" passed into the Constitution.* It is clear that in Morris's understanding, and in Wilson's as well, none but direct taxes could be levied by an apportionment among the States, the others named requiring to be laid by a general rate.

From what source, then, did Morris and Wilson derive this classification, which set down as direct certain taxes having this convenient characteristic of being readily apportioned among the States? The answer to this question is, no doubt, to be found in Hamilton's suggestion that the writings of the French economists of the eighteenth century were the source.† The doctrine that agriculture is the only productive employment, and that the net product from land, to be found in the hands of the land-owner, is the only fund from which taxation can draw without impoverishing society, led them to class taxes habitually as direct, when laid immediately upon the land-owner, and as indirect, when laid upon somebody else, but in their opinion destined to be borne by the land-owner ultimately. This distinction between direct and indirect taxation, resting upon the supposed method of incidence upon a single class of persons, is fully developed

* Elliot, v. 302.

† See his brief as counsel for the United States in the Carriage Tax case, *Hylton* v. *United States*, Hamilton's *Works*, vii. 845.

and used by Quesnay, Mercier de la Rivière, Dupont de Nemours, and Turgot. It was a necessary result of their reasoning, became familiar in all the discussions of the school in France, and, we can hardly doubt, was carried to the knowledge of readers in political science in other countries, during the short-lived pre-eminence of the Physiocrats.* As for the kinds of taxes to be classed as direct, there was not complete agreement. Necessarily, taxes upon land or its returns were set down as direct taxes, and so too, taxes upon commodities, or consumption, were called indirect. Taxes upon persons, however, do not appear to be regarded by Quesnay, Dupont de Nemours, or Mercier de la Rivière as direct. The writer last named, after saying that the fund for taxation is in the hands of the land-owner, and that to draw from it otherwise than directly is a subversion of the natural order of society, lays down the principle that "la forme de l'impôt est indirecte lorsqu'il est établi ou sur les personnes-mêmes ou sur les choses commerciables." † In Turgot's writings, however, we find taxes upon persons occasionally classed as direct. Thus, in his *Plan d'un Mémoire sur les Impositions*,‡ he says of the forms of taxation: —

> Il n'y en a que trois possibles: —
>
> La directe sur les fonds.
>
> La directe sur les personnes, qui devient un impôt sur l'exploitation.
>
> L'imposition indirecte, ou sur les consommations.

And in the fragment which we have of his *Comparaison de l'Impôt sur le Revenu des Propriétaires et de l'Impôt sur*

* Adam Smith did not adopt their use of direct and indirect, because he rejected the reasoning on which it rested; and he does not appear to have formally classified taxes under these heads upon any other principle, although he occasionally uses the terms "direct," "directly," and their opposites, with a near approach to their modern use.

† *L'Ordre Naturel des Sociétés Politiques*, in Daire's *Physiocrates*, 474. For Quesnay's use of the terms in question, see Daire, i. 83, 127; and for Dupont de Nemours', *ibid.*, ii. 354-358.

‡ Daire, i. 394; and see also 396.

les Consommations,* a memoir prepared for the use of Franklin, a careful analysis of the same purport is made, although the point of formal classification is not reached. Of all writers upon economics in 1787,† Turgot was perhaps the one most likely to have the ear of American readers; and, of Americans, Gouverneur Morris and James Wilson were as likely as any to give him their attention. The former had already formed that familiar acquaintance with French literature and politics which made his singular career in Paris possible a few years later, and Wilson had been from 1779 to 1783 accredited as advocate-general of the French nation in the United States. There was, then, an easy and a probable French source for the meaning which they both attached to the phrase introduced by Morris.

It is to be observed, also, that there were some well-known precedents for levying by apportionment such taxes as those which Morris and Wilson probably had in mind. The French *taille réelle*, a tax on the income of real property, was laid by apportioning a fixed sum among the provinces and requiring from each its quota, as has been the practice in levying its substitute, the *impôt foncier*, ever since 1790. The *capitation* was also levied in France, before the Revolution, in the same manner. The English land tax, established under William III., had for ninety years presented an example of apportionment among counties and other subdivisions, leaving the rate for each locality to be settled at the point necessary to give the due quota. Other contemporary examples could easily be cited; but these are enough for the present purpose, being necessarily familiar in this country in 1787, and likely to have a strong influence. ‡

* Daire, i. 409.

† Dupont de Nemours published his *Mémoires sur la Vie et les Ouvrages de M. Turgot* (16mo, 2 parts, pp. 156 and 216), in Philadelphia and Paris, in 1782, the year after Turgot's death. See Hildeburn, *Issues of the Press in Pennsylvania*.

‡ For the *taille* and *capitation*, see Pizard, *La France en* 1789, 257; De Parieu, *Traité de l'Impôt*, i. 224, 153. The Act of 1763 apportioning the English

The meaning of the phrase "direct taxation," as to which Rufus King vainly sought for light, was judicially considered in the well-known Carriage Tax case, *Hylton* v. *United States*, in 1796. The case had been heard in the circuit court by Wilson, who was then one of the associate justices of the Supreme Court; and, when his judgment in the lower court was affirmed by the full bench, he contented himself with a bare statement of assent, so that we lose what would have been the most interesting and perhaps the most important opinion of all. The judgment of the court, declaring that a tax upon carriages is not a direct tax within the meaning of the Constitution, was supported by considerations which showed a strong disposition to limit the definition of direct taxes so as to include only capitation and land taxes. Mr. Justice Paterson, indeed, suggested personal property by general valuation as a possible additional subject of direct taxation, the practicability of apportionment having already been accepted as a test of the proper meaning of the term; but he thought the question difficult, and added that he never entertained a doubt that the principal — he would not say the only — objects contemplated by the framers of the Constitution were a capitation tax and a tax on land. Wolcott, in his report upon "Direct Taxes," in December, 1796,* took no notice of the decision by the Supreme Court a few months before, but, for reasons of expediency, concluded that the objects of direct taxation should be limited to lands, houses, and slaves; and they accordingly were thus limited by Congress in the acts of 1798, under which the first direct tax was levied. When the question came before the Supreme Court again in the case of *Veazie Bank* v. *Fenno*,† Chief Justice Chase referred, with some doubt, to Paterson's suggestion as to a tax on

land tax is given in full in Ruffhead's *Statutes at Large*, ix. 78. The text of the Acts of William III. is found in the Rolls edition of the Statutes. See also Dowell, *History of Taxation and Taxes in England*, iii. 94–97.

* *State Papers on Finance*, i. 414. † 8 Wallace, 533.

personal property by general valuation, but remarked that, in the practical construction of the Constitution by Congress, direct taxes had been limited to land and capitation taxes, and that this construction was entitled to great consideration in the absence of anything adverse to it in the discussions of the Federal Convention or of the State Conventions which ratified the Constitution. Finally, when the whole subject was reviewed in the case of *Springer* v. *United States*,* Mr. Justice Swayne, giving the opinion of the court, declared it to be their conclusion "that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." The judicial interpretation of the phrase, "direct taxes," is well settled therefore, and in close accordance with the usage found in the writings of the French economists of the last century.

The acts of 1798† established the general plan on which all succeeding direct taxes have been levied. These acts apportioned the total sum of two millions of dollars among the States, divided them all into convenient divisions, placed every division under a commissioner, and provided the requisite array of principal and assistant assessors, collectors, supervisors, and inspectors. The quota of every State was to be assessed upon houses, lands, dwelling-houses, and slaves. Houses were to be assessed according to a classified valuation at rates fixed for the whole Union, and slaves were to be assessed fifty cents per head, if between twelve and fifty years of age; and so much of the quota of any State as was not covered by the levy upon houses and slaves was to be assessed upon lands and im-

*102 United States, 586. This was a case arising under the Act of 1864 laying an income tax, the plaintiff in error maintaining that this, as a direct tax, should have been apportioned among the States, under the provisions of the Constitution.

† The Act of July 9, 1798, 1 *Statutes at Large*, 580, provided for the valuation of taxable objects; and that of July 14, *ibid.*, 597, provided for the apportionment and collection.

provements at such rates as might be required to make up the deficiency.* The tax was to be a lien upon the real estate and slaves of the person assessed for two years from the date when it became payable, and collection could be enforced by distraint and sale of personal effects. Wolcott had suggested, but had also disapproved, a plan for fixing a time at which a State might pay its quota into the Treasury and for prescribing collection by the authority of the United States "in cases of delinquency."† But no trace of any such plan is to be found in the acts of 1798. Beyond the bare apportionment, the States are not recognized except as mere geographical divisions. The acts provide solely for levy by the Federal Government upon its citizens, the individual tax-payer is the only party responsible, and no authority stands or can interpose between him and his government.

The framers of the direct tax acts of 1813‡ followed in general the lines laid down in 1798. Comparison of the acts will show revision and rearrangement and perhaps simplification of the system, but no serious change of theory. The tax of three millions is apportioned to the counties in every State, and it is provided that the State legislature may by act vary the county quotas, provided such alterations are duly certified to the Secretary of the

*This residual assessment upon lands closely resembles the method adopted in assessing the group of taxes of which the English land tax is the survival. See 10 William III., c. 9 (Rolls ed.); and Act of 1763, 4 George III., c. 2, §§ 3, 4 (Ruffhead).

† This plan, he says, "partakes of the system of requisitions upon the States, which utterly failed under the late confederation, and to remedy which was one great object of establishing the present government." *State Papers on Finance*, i. 436.

‡ The Act of July 22, 1813, 3 *Statutes at Large*, 22, provides for the assessment and collection, and that of August 2, *ibid.*, 53, for the apportionment. Gallatin sailed for Europe in May, 1813, but it seems probable that the direct tax bills of that year were among the bills spoken of in his letter of June 10, 1812, as already prepared in answer to a request from the Committee of Ways and Means. *Ibid.*, 614. It is interesting to observe that, in January, 1812, Gallatin appears to have lost his hold on the strict definition of direct taxes under the Constitution. *Ibid.*, 525.

Treasury; but the levy according to such alterations is made by virtue of the act of Congress, and not under the act of the State legislature.* The tax is to be levied on the value of lands, houses, and slaves, "at the rate each of them is worth in money," abandoning the peculiar method of a residual assessment upon land, adopted in 1798; and the provisions as to enforcement by lien and distress remain as before. In short, the theory of the acts of 1813 continues to be that of a levy by the general government upon the individual citizen, in no way different in principle from any case of national internal taxation. With a wise regard to convenience, however, the apportioning act provided that any State "may pay its quota into the Treasury of the United States," and thus secure a deduction of fifteen per cent., by paying before February 10, 1814, or of ten per cent., by paying before May 1; "and no further proceedings shall thereafter be had under this act in such State." The option thus allowed to the States did not, however, change the character of the tax as a tax upon individuals, or make it a tax upon States. Seven States assumed the payment of their quotas;† but the other eleven, in which the collection by federal officers was made as originally provided, were not for that reason in any sense delinquent as States, nor did they thereby fail in any obligation to be found in the acts of Congress or elsewhere.

The act of 1815, which provided for an annual tax of six millions of dollars, is to a considerable extent a literal transcript from the two acts of 1813, with such amendments in detail as experience or the proposed permanency of the tax required, but with no change in theory or in general procedure. And no change was made by the act

*§ 6 of the Act of August 2, 1813, 3 *Statutes at Large*, 71. For the painful effort of the Committee of Ways and Means to arrive at a county apportionment, see their report, *State Papers on Finance*, ii. 628.

† *State Papers on Finance*, ii. 860.

of 1816,* which simply repealed the provision for an annual tax, and laid instead a tax of three millions for the current year. In 1815, and also in 1816, four States assumed the payment of their quotas; and the collection was made by the United States in the other fourteen.

When the levy of direct taxation by apportionment was resorted to for the fifth time, in 1861, Congress found most of the work of legislation done for it in advance. The first revenue measure of the war provided for an annual direct tax of twenty millions,† to be laid on the value of lands with their improvements and dwelling-houses, "at the rate each of them is worth in money." In its general scheme and in its details, the act of 1861 was a revised transcript of the acts of 1813 and 1815. The theory enunciated in *Hylton* v. *United States* was unfamiliar to many members; and the Committee of Ways and Means had to labor in debate with representatives who wished to include personal estate, or incomes, among the objects of taxation. The Committee itself at first treated slaves as taxable property, as was done in the earlier acts. But, in its careful provision for dealing directly with the individual citizen of the United States and for enforcing a direct lien upon his property, the law of 1861 follows the earlier legislation, section by section. It makes the same provision for an assumption of quotas by the respective States at their pleasure, providing that any State may give notice of its intention "to assume and pay, or to assess, collect, and pay," the direct tax, and upon payment be entitled to a deduction of fifteen per cent. in lieu of the costs of assessment and collection. The date for giving this notice was the second Tuesday of February, 1862, and the expectation that the States would use this option was so strong that the act post-

* The Act of January 9, 1815, 3 *Statutes at Large*, 164; the Act of March 5, 1816, *ibid.*, 255.

† The Act of August 5, 1861, 12 *Statutes at Large*, 294.

poned the appointment of assessors and collectors until that day. But the greater completeness of the optional arrangement does not appear to import any change in the real bearing of the act as laying a tax upon individual citizens.

The recommendation of this tax to the attention of Congress by Secretary Chase, in his report of July 4, 1861, did not imply any strong reliance upon it. Mr. Chase advised the raising of "twenty millions, for the current year at least, by direct taxes or from internal duties or excises, or from both." It is probable that both the Secretary in giving this advice and Congress in improving upon it were influenced by the fact that the earlier legislation on direct taxation could be made available quickly,* and that time was needed for the study of any broader system of internal taxes. The direct tax had, in fact, far less to recommend it in 1861 than at the beginning of the century. The inequality of apportionment according to population, serious enough at first, had been increased by the concentration of wealth in the commercial and manufacturing States. Only the smallness of the sum to be raised made a special assessment upon one species of property tolerable, in a country where personal property had multiplied so greatly. And, finally, the slowness of the method, amply shown by four trials, unfitted it for an occasion when promptness of supply was of the last consequence. But all of the action at the special session of 1861 was essentially provisional, and both for the Secretary and for Congress it was a welcome reflection that twelve or fifteen millions could be

* The Chairman of the Committee of Ways and Means, Mr. Thaddeus Stevens, felt no mortification when Mr. Roscoe Conkling stigmatized the bill as "undigested." "It may be so, for it was a direct copy of one drawn by a man who was less wise than our critics are now. It was drawn by Albert Gallatin; and this undigested, ill-considered bill is an exact copy of his." *Globe*, 1861, p. 307. Mr. Collamer, of Vermont, remarked in the Senate that "the bill is essentially the same, in all its essential features, with the bill by which a direct tax has been laid four times in this government." *Ibid.*, 398.

added to the regular revenue by a tried expedient and by forms already settled.

The organization of the internal revenue system in 1862 appeared to the Senate a fit occasion for repealing the direct tax, but not so to the House. In the committee of conference on the internal revenue bill, the House members insisted that the repeal would release real estate from its due share of burdens, and would leave the whole weight of taxation to be borne by commerce and manufactures; and the difference between the representatives of the two Houses was so great that the bill was nearly shipwrecked in conference.* But the House receded in substance, and the Senate in form; and thus the act of July 1, 1862, provided (in § 119) that the direct tax act of 1861 should be held to authorize the levy and collection of only one year's tax, and that no other should be levied under the said act until April 1, 1865. This suspension of levies under the system was made final by the great internal revenue act of June 30, 1864, which (in § 173) provided that no further direct tax should be assessed until Congress should "enact another law requiring such assessment or collection to be made." By this action, proposed by the Senate and accepted without demur by the House, proceedings under the direct tax of 1861 were finally limited to the levy and collection of a tax for that year only.

The results of the levy for 1861 can be considered more conveniently if we separate the loyal States and Territories from those in insurrection. Of the former, all except Delaware and Colorado Territory assumed the payment of their quotas. The act of 1861, following the precedents of 1813 and 1815, allowed any State or Territory, upon giving due notice, to assume or assess "in its own way or manner" its quota, with a deduction of fifteen per cent., if

*See Mr. Stevens's statements to the House, June 23, *Globe*, 2890, 2891.

payment should be made to the Treasury before July 1, 1862, or of ten per cent., if made before October 1, with the provision that such quotas might be satisfied by the release of liquidated and determined claims of equal amount due to any State or Territory by the United States. The settlement of the quotas by this process of offset, at a time when every loyal State had its account against the general government for military services, equipments, or advances of some sort, and the slow passage of such accounts through the forms of the Treasury, no doubt makes the collection from the direct tax, as given in the published tables, appear much slower than it was in point of fact.* Still, it can probably be said with truth that the government received nothing from the direct tax during the war which it would not have received otherwise. The loyal States which paid their quotas in services and equipments would have raised as many men and have equipped them as promptly if the direct tax had never been laid. Their quotas ultimately gave the government some facility for the adjustment of their accounts, but the military aid on which the quotas were virtually expended was not called out by taxation. In Delaware and Colorado, the tax was collected, after some delay, by the internal revenue officers of the United States; and thus, except some trifling amounts from the Territories, the accounts of the loyal States and Territories for the direct tax were cleared. The amount assessed upon all the States and Territories, except the eleven States in insurrection and the Territory of Utah, was $15,027,534. Deducting the allowances made to States which advanced their quotas, the amount collected

* The annual *Finance Report* states the receipts from direct taxes down to 1870 as follows: —

1862,	$1,795,332	1867,	$4,200,234
1863,	1,485,104	1868,	1,788,146
1864,	475,649	1869,	765,686
1865,	1,200,573	1870,	229,103
1866,	1,974,754		

from the loyal States and Territories appears to have been $12,937,805.*

There remain the eleven States which were in insurrection when the tax was laid and the Territory of Utah. More than one of the speakers in Congress urged as a recommendation of an apportioned tax that the amount allotted to any State in arms against the government could stand over for ultimate collection, and that communities which refused to contribute to the revenue in any other form might thus be made to yield finally a share of direct taxation. The act of 1861 accordingly provided (§52) that, if the execution of the law should be prevented in any State by rebellion, it should be the duty of the President, "so soon as the authority of the United States therein is re-established, to collect the sums due from the persons residing or holding property or stocks therein," with interest for delay. Detailed provision was made and special machinery was established for the same purpose in 1862 by the act of June 7, "for the collection of direct taxes in insurrectionary districts within the United States and for other purposes." This act made full provision for the levy of the tax in case of partial occupation of the territory of any State by the forces of the United States. It authorized the levy upon lands in insurrectionary States according to the last State valuation, and charged every parcel accordingly with its proportion of the quota of the State, and with a penalty of fifty per cent. in addition, the tax and penalty becoming a lien upon the lands in all States or parts of States declared by the President, by due proclamation, to be in insurrection.† A board of three tax commissioners was

* This is the statement for February 18, 1888, given in *Cong. Doc.*, 1887–88, *House Reports*, No. 552, 44, deducting $8,409 overpaid by Wisconsin. It is to be observed that the figures given cannot be reconciled with precision, the methods of accounting in the Treasury having been inconsistent; *e.g.*, *ibid.*, 9, 15.

† The proclamation of July 1, 1862, declared in insurrection the eleven States, with the exception of thirty-nine counties of Virginia, comprised in the inchoate State of West Virginia.

to be appointed for every insurrectionary State, to enter upon their duties whenever the commanding general entering any such State "shall have established the military authority of the United States throughout any parish or district or county of the same." Sixty days were allowed for payment by the owner of any parcel of land after the amount of tax due upon it should have been fixed; and thereupon all lands upon which the tax was unpaid became forfeited, and the commissioners were required to advertise them for sale to the highest bidder and to strike them off to the United States, unless some person should bid as much as the tax, penalty, costs, and interest for delay of payment. Provision was made for the redemption of property thus sold, if the owner or any person in interest should appear within sixty days and make payment, taking an oath to support the Constitution of the United States. Redemption within one year was allowed to any owner who should be unable to make payment by reason of the insurrection, and should have taken no part therein after the passage of the collection act; and two years for redemption were allowed to absentees, aliens, or persons under legal disability.

Under the act of June 7, 1862, commissioners from time to time made assessments for the direct tax in about one-half of the counties in the eleven States, and made collections in all those States, except Alabama.* Assessments were enforced by sales of lands for taxes in districts occupied by the federal forces until the order of the Secretary of the Treasury, on May 17, 1865, suspending all such proceedings. The sales were necessarily within narrow areas,† and the amount received

* *Report of the Commissioner of Internal Revenue* for 1883, in *Finance Report*, 165.

† The sales in Virginia were in the counties of Alexandria, Accomack, and Northampton,— that is, near Washington and on the Eastern Shore; in South Carolina, they were confined to the parishes of St. Helena and St. Luke, in the Sea Islands; in Florida, to St. Augustine and Fernandina; in Tennessee, to Memphis; and in Arkansas, to Little Rock.

from the sale of valuable properties under such circumstances was trifling.* After the suspension of sales, the collection still went on, but under great difficulties, caused by the unsettled and impoverished condition of the South. Moderate as were the sums called for, the distress of Southern tax-payers made a profound impression. The Joint Committee on Reconstruction, which reported the fourteenth amendment of the Constitution, recommended a measure whereby any Southern State, upon ratifying the amendment, should be empowered to assume the payment of such part of the direct tax assessed upon its citizens as should still remain unpaid, with permission for postponing the payment in that case for ten years.† The House, on the 9th of July, 1866, on motion of Mr. Boutwell, who remarked that "the operation of collecting what remains uncollected of the direct tax in the rebel States operates more harshly upon our friends than upon our enemies," inserted a section in a tariff bill of that session suspending that operation until January 1, 1868. The tariff bill did not reach final action; but the Senate, on the 24th of July, inserted the same provision at the end of a bill to protect the revenue and in this form it became a law.‡ The Southern States, it was explained in the Senate, were proposing to assume their respective quotas, with some indulgence to be given by Congress in the way of credit; and it was deemed unwise to distress individuals by the regular process of collection, when the whole matter could be arranged on easier terms. At the next session, by the act of March 26, 1867, the Secretary of the Treasury was authorized to discontinue the employment of officers for the collection

* For an account of the property sold in Virginia, Florida, Arkansas, and Tennessee, with the valuation of each parcel, the tax due thereon, proceeds of sale, and other particulars, see the letter from the acting Secretary of the Treasury, February 26, 1883, in *Senate Exec. Doc.*, No. 85, of 1882–83.

† See *House Reports*, 1865–66, No. 30, v.

‡ See *Congressional Globe* for 1865–66, 3692, 4068. The provision is § 14 of the Act of July 28, 1866.

of direct taxes in the insurrectionary States, and to turn over the business to the local officers of internal revenue. A joint resolution of July 23, 1868, continued the suspension of proceedings until January 1, 1869; but, when that day came, no further measures were taken by Congress or by the Executive, and thus the further collection of the tax was practically abandoned. Attention to the subject was asked for by the Commissioner of Internal Revenue in 1868,* but the subject had clearly become too much embarrassed to be inviting. It is clear, however, that down to this time the government, in collecting the tax, had dealt with the individual tax-payer precisely as in all other cases of taxation. The privilege of assumption, allowed to the States by the original act, not having been used, had expired by its own terms; and, as no renewal of the offer was made by the United States, the direct tax continued to be an obligation resting upon the individual when assessed, secured perhaps by a lien upon his land, but binding upon no other person or body of persons whatever.

It was, perhaps, owing to the expectation of an arrangement for the assumption of unpaid quotas by the Southern States that the First Comptroller of the Treasury, in a statement of accounts between the general government and the several insurrectionary States on May 20, 1868, charged them with their respective quotas as if some legal liability therefor rested upon them. This view of the case, although not uniformly followed by subsequent comptrollers,† appears for many years to have fixed the construction of the law for the accounting officers in the Treasury.‡ The States being charged each with its un-

* See *Finance Report* for 1868, 482.

† See the important adverse decision by A. G. Porter, First Comptroller, giving the legislation from 1798 and much documentary matter, *Senate Exec. Doc.*, 1879, No. 24.

‡ See *House Exec. Doc.*, 1885-86, No. 158, 15.

"It must be acknowledged that this construction of the law appears not to conform to the intention of the acts upon this subject; but the decision

paid balance of direct tax, moneys becoming due to them from the general government upon other accounts, as from the sale of public lands in which they were interested jointly with the government, were not paid over, but were credited to them by way of offset. The extreme point in this official confusion was reached when, in 1883, the First Comptroller decided that the sum of $35,555, appropriated by act of Congress to refund to the State of Georgia money expended by her for the common defence in 1777, should be paid to the Treasurer of the United States, "to the credit of the State of Georgia on account of direct taxes charged against the State." * As far as a government can be said to remember or forget, the government of the United States must be said at this juncture to have forgotten what it meant by the direct tax of 1861. The true meaning of the tax was settled, however, by the highest authority, and the whole subject placed in its true light, when the Supreme Court of the United States, in the case of the *United States* v. *Louisiana*, at the October term, 1887,† decided that the direct tax law in 1861 did not create any liability on the part of a State to pay the tax, and that the apportionment merely designated the amount to be levied upon the property of individuals in the several States, without any liability attaching to the State in its political and corporate character. This decision finally leaves the unpaid quotas of the direct tax in precisely the same position as any other tax assessed upon individuals, which the United States government has been unable, or has neglected, to collect in full. It is difficult, for example, to distinguish it in any essential particular from the case of

fixing it as a State debt has such force in the Treasury Department as to preclude any other view of the direct tax than that of a debt due by the State. . . . If the State owes the debt, the land-owner does not owe it." *Ibid.*, 17.

*4 *Decisions of the First Comptroller* (*House Miscell. Doc.*, 1883–84, No. 56), 354.

†123 United States, 37. The opinion of the court was given by Field, J., no one dissenting.

unpaid income taxes laid during the war and collected by severe process throughout the loyal States, but neither then nor at any other time collected in the insurrectionary States.

This decision plainly makes it necessary, in determining the amount still unpaid on the quotas of the Southern States, to disregard all the accounts with tax commissioners and with States, and to set down simply the amount of taxes reported as uncollected. These are the amounts due from individuals; and, as no individual owes any more than the due assessment upon his property, by reason of any other person's default, so no individual owes any less than that assessment, because of money stopped on its way to the State Treasury, or otherwise coming to the United States from any of his fellow-citizens. The amounts reported as remaining uncollected,* in the eleven insurrectionary States and in Utah, are given in the following table: —

	Quotas.	*Uncollected.*		*Quotas.*	*Uncollected.*
Alabama, .	$529,313	$529,313	N. Carolina,	$576,195	$198,742
Arkansas, .	261,886	107,185	S. Carolina, .	363,571	141,174
Florida, . .	77,523	72,762	Tennessee, .	669,498	277,506
Georgia, . .	586,367	501,940	Texas, . .	355,107	174,265
Louisiana, .	385,887	71,386	Virginia, . .	729,071	286,663
Mississippi, .	413,085	343,500	Utah, . . .	26,982	26,982
				$4,972,485	$2,731,418

The process of collection in the insurrectionary States during the war by assessment and sale of property in limited districts, under the act of June 7, 1862, caused great hardship to dispossessed owners; but this was buried

*These sums are taken from the accounts stated by a commission, appointed by Secretary Manning in 1885, to investigate and adjust all the direct tax accounts. *House Exec. Doc.*, 1885-86, No. 158. See particularly, pp. 24-31 and 7-12. The sums found by this commission to be still due differ from the amounts stated by Secretary Folger in 1884 and from the statement made by the Commissioner of Internal Revenue in 1885, and the Secretary and the Commissioner also differed from each other. *Ibid.*, pp. 14, 15. The report of the commission appears to have been adopted in the Register's office. See *House Reports*, 1887-88, No. 552, p. 44.

and lost sight of in the vast destruction of property and the wide-spread ruin which marked the track of contending armies. In South Carolina, especially, this process led to complications which must be noticed briefly as an important element in the general confusion caused by the tax. The act of 1862, as has been said, authorized the tax commissioners, where property was sold in the insurrectionary districts for the tax, to strike it off for the United States, if no other bidder offered more than the tax and penalty with interest. Under an act of February 6, 1863, the commissioners were authorized to bid on behalf of the United States as high as two-thirds of the assessed value of the property. Lands struck off to the United States the commissioners were empowered to lease until the re-establishment of civil government, or, under the direction of the President, to sell in limited parcels to loyal citizens or to persons who had served in the army or navy, only one-fourth of the purchase money being required in cash from army or navy purchasers; and the proceeds of leases and sales were to be paid into the Treasury of the United States, one-half thereof to be paid over ultimately to the re-established State governments for specified purposes.

The special application of these provisions to the case of South Carolina was affected by the peculiar circumstances under which the forces of the United States held the abandoned Sea Islands with their valuable cotton lands, and by the great numbers of colored people col lected there. The lands sold for taxes were there held and managed from the first with necessary reference to the employment and well-being of the black population. To this end, instructions were issued by President Lincoln, September 16, 1863, which, besides regulating the sale of land to persons of the army and navy, required certain plantations to be sold in five-acre lots, set apart others to be leased and the rents to be used for school purposes, and a further large number to be divided into twenty-acre

lots, to be sold "to the heads of families of the African race."* Under these arrangements, some lands, bought in at the tax sales for the United States, remained for several years in the possession of the government; others were resold at a large advance; others still, having been sold and partly paid for, reverted to the government, and were resold or remained in its possession. The transactions became involved, litigation sprung up, and it became plainly impossible for the government to manage its complicated interests in the Sea Islands with advantage. Congress, therefore, by a general act, dated June 8, 1872, with judicious liberality provided that any lands owned or held by the United States, under the collection act of June 7, 1862 and the subsequent proceedings, and not used for public purposes, might be redeemed by the original parties in interest or their representatives at any time within two years, upon payment of the tax and costs, with interest at the rate of ten per cent., saving the rights of all persons who might in the mean time have made valuable improvements. Lands not redeemed at the end of the two years were to be sold by public auction, but by subsequent acts the period for redemption was extended to February, 1877. The school farms spoken of above were not covered by this act, but were similarly provided for by the act of March 3, 1887, which closed a troublesome and exceptional piece of administration.

The result of these operations is that, the quota of South Carolina being $363,571, of which $141,174 remains unpaid, the Treasury of the United States appears to have received in cash $468,864, besides sums amounting to $134,592 paid to the Freedmen's Bureau and otherwise disbursed on various accounts, of which a part should no doubt be added to the sums accumulated in the

* These instructions, with a variety of other documents, are annexed to the report of A. G. Porter, First Comptroller, in *Senate Exec. Doc.* of 1879, No. 24, p. 223.

Treasury as the result of the tax sales. That the former owners of the lands have no claim to this fund as against the government goes almost without saying. At the same time, it is clear that, whatever else the government may do as to the direct tax, this is not money to be retained by a great and generous nation.*

It has been seen that the decision of the Supreme Court in the Louisiana case finally brought the direct tax of 1861 back to its proper position as a tax laid by the United States upon its individual citizens and imperfectly collected by reason of the civil war. The default in its collection being a default of less than one-seventh of the total amount called for, it is probable that this tax has been more completely collected than most of those laid during the war. For example, it has probably been collected more thoroughly than the income tax, the foundation of which was laid by the same act which established the direct tax; and it is not likely that anything but an overflowing treasury would have enabled Congress to see in the one case more than in the other an occasion for remedial legislation. Under any other conditions, it is likely that the uncollected $2,730,000 of direct tax would by common consent have been treated as an insignificant detail in a great mass of incurable irregularities left behind by four years of civil war. The question as to the possibility and expediency of clearing up this special case of fiscal confusion having been raised, however, it must be admitted that the solution of it is not simple and that the division of opinion created is not unnatural.

Three modes of dealing with the subject have been suggested. First is that proposed by the Commissioner of Internal Revenue in 1883,† "that measures be taken, as soon as possible, to collect the balance of the tax," on the ground that "exacting a direct tax from one land-owner

*See the remarks of Mr. Sherman, pp. 460, 461, below, *note*.

†*Finance Report*, 1883, 167.

and permitting the tax upon the land adjoining to remain unpaid is not equitable." The reason is undeniable; but, after all, could equity be secured now by resuming the collection of a tax, all proceedings under which have been suspended for twenty years? The condition of landed property has altered, in one place for the better and in another for the worse, throughout the States concerned; the rights in such property have changed hands, and all the relations once existing between the individual members of any body of tax-payers and forming the basis of possible equity in 1861 have vanished. A large part of the individuals themselves have disappeared. To levy upon the lands on which the tax is unpaid would be, in a great proportion of cases, to collect a tax from subsequent purchasers under a claim which they were justified in believing that the government had abandoned long ago. It has been declared with great positiveness that the government has lost its hold upon the land, but this point need not be considered. If the government still retains the right of assessment on the lands of delinquents, the exercise of that right upon the lands as now owned and used would be universally recognized as too difficult and too certainly unjust, as between members of the same community, to be an admissible expedient. The cure of the difficulty by the first method appears, then, to be out of the question.

The second mode of dealing with the case, the opposite of that just considered, is to return such taxes as have been paid under the legislation of 1861, and to remit all that are unpaid. In other words, equity being unattainable by completing the levy, secure it by undoing what has been done. It is not within the proposed scope of this paper to discuss the constitutional question as to the right of Congress to lay taxes, let us say in 1890, in order to refund taxes which were properly levied and collected according to law in 1862–66. We are here concerned

solely with the proposition to remedy the inequality resulting from the failure to collect from all of the tax-payers in 1862 and the years following. Undeniably, if there were no question except one of book-keeping between the States of the Union, as the Treasury has sometimes seemed to suppose, the process of crediting every State with an amount equal to its quota would finally close the accounts and produce equality in that sense. But the only question really open, under the circumstances, is that of producing equality among the tax-payers; and this object it appears to be impossible to secure by any process of refunding. If, of two men, one paid his tax twenty-five years ago and the other has never paid it, it is impossible to restore equality by simply returning to the former that which has been detained from him for a quarter of a century. And if a third, when assessed, suffered the collection of the tax by a forced sale of his land for a fraction of its value, he is not placed on the same footing with either of the others, by returning to him or his heirs the amount of the tax or even the proceeds of the tax sale. In short, when the tax-collector has done a part of his work by compulsory process and time has elapsed, an equitable adjustment between individuals becomes impossible. Refunding the tax may satisfy the mere formal accountant, but it does not undo the past or its consequences; and, so far as the object sought is the equalizing of burdens, such a measure is nearly nugatory.

It is, at any rate, so nearly nugatory that there may be a grave question whether, in the attempt to cure one set of inequalities by a distribution of money, a greater set does not spring out of the process of raising the money. It was contended in debate in Congress that the taxes collected in 1890, after the growth of the States has changed their relative places in population and wealth, would not rest upon them in the proportion in which the contributions of 1862–66 must be returned. Kansas, it was said

by one gentleman, will pay towards the refunding operation not less than $340,000, but will receive less than $72,000; New Hampshire, it was said in the Senate, will receive but $185,000, and will contribute at least $300,000. The incidence of our taxation is too uncertain to make these calculations important; and, in most cases of expenditure for public objects, such considerations as to the exact balance of benefits and burdens are properly disregarded. But the present is a case in which the attempt to restore such a balance with respect to a particular transaction is the main proposition; and it therefore becomes not only justifiable, but necessary, to inquire whether the proposed equality would be real or only apparent. The answer to this question is found in the census tables, where the redistribution of tax-paying power in the last quarter of a century is too manifest to require recital.

The third method of dealing with the subject would be, if we can neither complete the collection nor return the tax without producing fresh mischief, to leave the matter where it is. No doubt, this course, as well as the others, is open to objection. It is a peculiarity of the case that the United States can neither act nor refrain from acting in it without running counter to some instinct of justice. But there would be less disturbance of existing interests, and time would heal all difficulties more quickly, it is probable, if it were frankly recognized that, in such matters, the errors or misfortunes of the past are finally beyond all remedy. The funds which have been collected from the proceeds of lands leased or resold, or from the surplus of tax sales, might be returned to the parties representing the original ownership, and the account of the direct tax could then be wound up, as that of the other taxes of the war has been, without further inquiry as to the degree in which different bodies of citizens contributed to them.

It is the second of these methods, however, which has

secured the approval of Congress. The bill which was passed last winter, vetoed by the President and passed over the veto by the Senate in the closing hours of the session, was the fruit of an agitation which has been in progress in different forms for ten years, and has developed a strong appetite among the State governments for the refunding of their quotas. The bill required the Secretary of the Treasury to credit every State and Territory and the District of Columbia with a sum equal to all collections made from it or its citizens, by set-off or otherwise, and to remit all sums remaining unpaid; and appropriated the money necessary to pay all sums thus becoming due from the Treasury; it being provided, however, that sums which have been collected in any State from citizens, directly or by sale of property, should be held in trust by the State government for the benefit of the persons from whom collection was made, or their representatives. It was also provided that the owners of lands sold in the parishes of Saint Helena and Saint Luke's in South Carolina should be paid the value of their lands,— to the owners of lots in the town of Beaufort one-half of the value assessed by the direct tax commissioners, to the owners of cultivated lands five dollars per acre, and to the owners of other lands one dollar per acre, with the proper exceptions as to lands heretofore redeemed. The purchase money received on account of uncompleted sales to persons in the army and navy was to be returned to the persons paying it. For all these purposes $500,000 was to be appropriated, including in this sum moneys in the Treasury derived in any way from the enforcement of the tax.* And,

*As passed by the House, the bill proposed to pay the dispossessed owners according to the valuation of 1860, and appropriated $850,000 for the purpose. The rate and amount were cut down in conference, to meet the views of the Senate. On the adoption of the report of the conference committee, Mr. Sherman made this explanation: —

"Upon the first sale for direct taxes, the land was bid in, I think, at some $13,000, which we credited to the State of South Carolina; and it was

finally, moneys received from the sale of lands bid in for the United States at tax sales in any State, in excess of the taxes assessed, were to be paid to the owners of the land bid in and resold, or to their representatives.

This bill was not reached by the House of Representatives after the veto, and therefore failed to become a law. There can be little doubt that it will be passed by the present Congress. It is sufficiently clear from its terms that the combination of local interests in its support is powerful, and it has every political chance in its favor. The passage of the measure, whenever it comes, will close a singular chapter in the history of taxation,—a chapter the repetition of which, we may be sure, our people will not be easily tempted to risk hereafter. The direct tax provided for by the Constitution has at last been effectually discredited as a source of revenue, and it has also been too prolific of misconception and confusion to have any interest henceforth as a practical measure of finance.

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subsequently resold by the United States for $455,000. So, after all, the money we are to pay back to the owners of this land in South Carolina is only about the sum that we received on the resale of the land." *Cong. Record*, 1888–89, p. 2139.